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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

IN THE MATTER —of— KLEIN'S OUTLET INC., formerly alleged bankrupt.	
KLEIN'S OUTLET INC. and WILLIAM R. KLEIN, Petitioners, —against— HAROLD L. LIPTON, Respondent.	No. 190

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, ETC.

HAROLD L. LIPTON,
Respondent
(A Member of the Bar of this Court).

ARTHUR MORRIS,
Of Counsel
(Attorney for Respondent as Appellee below).

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IN THE

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IN THE MATTER —of— KLEIN'S OUTLET INC., formerly alleged bankrupt. KLEIN'S OUTLET INC. and WILLIAM R. KLEIN, Petitioners. —against— HAROLD E. [illegible]PTON, Respondent.	No. 190

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, ETC.

STATEMENT OF FACTS.

The petitioners here have not seen fit to furnish the Court with any of the following papers:

1. The two orders of Judge Holtzoff from which the petitioners, as appellants below, appealed or sought to appeal to the Court of Appeals.

2. Judge Holtzoff's opinions.

3. The papers on which Judge Holtzoff's orders were based.

4. The notice of appeal to the Court of Appeals.

It is respectfully submitted that without such papers this Court cannot determine whether the appeals were meritorious or frivolous. Such papers were deemed to be before the Court of Appeals on petitioners' motion for an extension of

time to file the printed record in that court. It is one of the rules of that Court that an appellant who (as was conceded below) had failed to perfect his appeal in time (even though the notice of appeal be timely) and asks a favor of the Court of Appeals must show (a) a valid reason for the delay and (b) a meritorious appeal.

Whether or not the notice of appeal is timely, an appeal is properly dismissed where appellant fails on a motion for an extension of time. Such motion is addressed to the discretion of the Court of Appeals.

The omission of petitioners to furnish this Court with Judge Holtzoff's orders, the papers therein recited, his opinions, and the notice of appeal, is significant because the petition to this Court contains alleged factual statements contrary to such record.

We ask the Court's indulgence while we make a brief summary, based on the papers before Judge Holtzoff, of this weird and protracted litigation, which, from its inception in the District Court, has been a fraud upon that Court and an abuse of its process. This litigation never belonged in the Federal Courts, but was brought here at the instance of William R. Klein in a fraudulent attempt to sabotage a sizeable judgment recovered against him in the Supreme Court of the State of New York, County of New York, in favor of Klein's Outlet Inc. For such efforts, which have succeeded in delaying first the recovery of the judgment and then its collection, he, and certain of the long string of attorneys, we think about 18, who have appeared against us from time to time, have been severely condemned (but not deterred) by Judges of the State and Federal Courts.

In the early part of 1940, an action was commenced in the Supreme Court, New York County, on behalf of Klein's Outlet Inc. against William R. Klein, and others. Rose Klein, a minority stockholder, was the nominal plaintiff, suing on behalf of the corporation. She alleged a cause of action, not in her own right, but in favor of the corporation. The action ultimately resulted in a judgment in favor of the corporation of upwards of Twenty-nine Thousand Dollars. It took us

five years to get that final judgment. The trial was had in the fall of 1940 before Mr. Justice Rosenman and took five days. He found that the corporation had been defrauded of merchandise and damaged in other respects by reason of the acts of William R. Klein, and others. William R. Klein, the two-thirds stockholder, was also interested in a different corporation which was in the same business, and he and other defendants had fraudulently purchased merchandise for the other corporation in the name of Klein's Outlet Inc. Judge Rosenman also found that "under cover of darkness" merchandise had been improperly removed. Mr. Justice Rosenman made an interlocutory judgment in December of 1940 sending the matter to a Referee to compute the damages and with a direction that judgment be entered in favor of the corporation accordingly. Mr. Justice Rosenman granted a motion, in that action, for the appointment of a Receiver of Klein's Outlet Inc. and he appointed Harold L. Lipton. The day after the decision appeared in the Law Journal, an involuntary petition in bankruptcy (dismissed seven years later) was filed against Klein's Outlet Inc. In the words of the Court of Appeals for the Second Circuit, the filing of that petition was "inspired" by William R. Klein (160 Fed. 2d 412). The attorney who filed that petition was severely rebuked by one of the Judges of the District Court. The late Mr. Justice Bright, by opinion dated January 27th, 1944, stated:

> "The day after that announcement appeared in the Law Journal the same attorney filed a petition for involuntary bankruptcy. It appears in the papers that for his services in the arrangement proceedings, really those rendered for the benefit of William R. Klein, he was paid by check of the alleged bankrupt which he shortly after claimed was insolvent. Of course, he has an explanation for that, but his testimony fails to explain; it merely entangles further."

Said attorney, before the filing of said petition, had been the personal attorney for William R. Klein and David Klein (another judgment-debtor) in a different matter.

Judge Bright directed that the computation of damages, under the interlocutory judgment of the State Court, be completed in that Court. Please see opinion of United States Circuit Court of Appeals, 136 Fed. 2d 986.

There followed further delaying tactics in the State Court. We also refer to the opinion of Mr. Justice Levy, a Justice of the Supreme Court of the State of New York, copy appended, wherein he severely reprimanded this judgment-debtor for his delaying tactics. Finally and in June of 1945, and not until after the matter had been to the Appellate Division of the Supreme Court of the State of New York, First Department, on several occasions, we got final judgment in favor of Klein's Outlet Inc. for over Twenty-nine Thousand Dollars. It made allowances for attorney's fees, referee's fees, stenographer's fees, and accountant's fees. By said judgment Harold L. Lipton, who had been previously appointed State Court Temporary Receiver, as aforesaid, was appointed Permanent Receiver of the corporation under the General Corporation Law of the State of New York. As such, he is vested with title to the corporate assets, including the judgment, and the United States District Court has so ruled, as have Judges of the Supreme Court, if indeed we need a ruling on that elementary question. At the time when the final judgment was entered, the involuntary petition was still pending undetermined, for reasons hereinafter set forth. The Bankruptcy Referee had ruled that while the petition in bankruptcy was still pending undetermined, collection should be effected through the Bankruptcy Court. The same individual, Harold L. Lipton, Permanent Receiver under the Supreme Court judgment, was appointed Receiver in Bankruptcy. Judge Bondy had ruled that he should be appointed so that, in case the involuntary petition was dismissed, he would be in a position to turn over to himself, in his capacity as State Court Receiver, the assets of the corporation (50 Fed. Supp. 557). He was specifically empowered and ordered by the United States District Court to take any and all steps, including supplementary proceedings, to collect the judgment.

Still we could not get a trial on the involuntary petition in bankruptcy because the Bankruptcy Law provides that no trial can be held on an involuntary petition while a plan of arrangement is pending, and so our adversaries embarked upon the procedure of offering successive plans of arrangement. One was abandoned and three others were denied confirmation. At this point, Judge Leibell enjoined our adversaries from filing any more plans of arrangement. His opinion, copy appended, takes them severely to task for their tactics in avoiding a trial.

Finally and in this situation, the decks seemed to be cleared for a trial on the involuntary petition. On the eve of the trial it was dramatically announced in Court that William R. Klein had "purchased" the stock interest of Rose Klein, the minority stockholder. Harold L. Lipton, in his capacity as Receiver of the Supreme Court, moved for leave to intervene and defend against the involuntary petition, and that motion was granted.

Then various motions were unsuccessfully made by William R. Klein in the United States District Court based upon this alleged purchase of the stock, plus the additional circumstance that William R. Klein had acquired, by assignment, the claims of some unsecured creditors. Judge Knox held that there were property rights in the judgment which had to be protected. In this situation a trial was had on the involuntary petition in the early part of 1948. It was a strange trial. The original petitioning creditors assigned their claims to William R. Klein and he, as the alleged holder of all unsecured claims, and as the alleged sole stockholder of Klein's Outlet Inc., sought to sustain the involuntary petition against his own corporation. Mr. Lipton, in his capacity as State Court Receiver (not as Bankruptcy Receiver) and as Intervener, was in opposition. The Referee dismissed the involuntary petition after trial, finding that there was neither insolvency nor act of bankruptcy. He found the corporation was solvent to the extent of 120%, having assets of $46,364.78 as against claimed liabilities of $20,965.65. The order of dismissal, from which no review was sought, specifically reserved

jurisdiction to pass on the Receiver's account, allowances and distribution of the funds.

In this situation the judgment-debtor embarked upon a new series of motions in the Supreme Court of New York County and the Supreme Court of Queens County which are quite pertinent to the matter now before this Court. In the Supreme Court in New York County, he moved for an order discharging Mr. Lipton in his capacity as Receiver under the final judgment. Among the claims advanced were that Mr. Lipton had not properly qualified and that in any event the receivership was moot because he, William R. Klein, was now the sole stockholder of Klein's Outlet Inc., and the sole creditor. In opposition we showed that no payment had been made for the awards made by the judgment to the accountant, attorney, stenographer and referee, and we also disputed, as we now dispute, that William R. Klein is either the sole stockholder, or the sole creditor.

Judge Hammer's disposition of that motion is pertinent. The decretal part of his order reads as follows:

> "Ordered, that the awards and allowances heretofore made herein are to be paid by Harold L. Lipton, the permanent Receiver herein, out of the corporate assets when the same come into his possession, and that after making said payments the said permanent receiver shall render an accounting."

At or about the same time, a motion was made by William R. Klein in the Supreme Court, Queens County, to terminate a supplementary proceedings instituted in Queens County and to terminate a receivership of the judgment-debtor. The opinion of Judge Hill follows:

> "Klein v. Klein; Klein's Outlet, Inc. v. Klein — William R. Klein, one of the judgment debtors under a judgment in favor of Klein's Outlet, Inc., moves for an order to vacate and dismiss supplementary proceedings and to dismiss and discharge the receiver of his property appointed in said supplementary proceedings.
> "The receiver in supplementary proceedings of the property of the judgment debtor was appointed on the

application of Harold L. Lipton, as receiver of Klein's Outlet, Inc., the judgment creditor. Lipton was appointed permanent receiver of the judgment creditor by a final judgment made June 7th, 1945, in a minority stockholder's action brought in the Supreme Court, New York County, on behalf of Klein's Outlet, Incorporated, by Rose Klein, a minority stockholder. Said final judgment awarded judgment to Klein's Outlet, Incorporated, against William R. Klein, David Klein, and others, in the sum of $29,915.03 and made awards to the referee appointed by an interlocutory judgment in said action, and also made awards to the stenographer, accountant and attorneys for services rendered in the procurement of judgment in the corporation's favor.

"At the time of the entry of such final judgment, there was pending and undetermined an involuntary petition in bankruptcy against Klein's Outlet, Incorporated. The United States District Court appointed the same individual Harold L. Lipton as receiver in bankruptcy of said Klein's Outlet, Inc., and it was on his application that the receiver of the judgment debtor in supplementary proceedings herein was appointed.

"In his capacity as permanent receiver, Lipton resisted the involuntary petition, claiming that it was fraudulent and was filed for the purpose of aiding the judgment debtors in their efforts to avoid the consequences of the judgment.

"As permanent receiver, he was permitted to intervene in the bankruptcy proceeding and to contest the involuntary petition. A trial was had in the matter in which William R. Klein, one of the judgment debtors sought to sustain the involuntary petition and Mr. Lipton, as intervener, opposed. Upon the trial of the bankruptcy issue, the referee found neither insolvency nor act of bankruptcy and dismissed the involuntary petition. The trial was had in January and February of 1948. Mr. Lipton is still receiver in both courts. Although the involuntary petition has been dismissed, Lipton has not been discharged as receiver in bankruptcy. His account must still be approved, and petitions for allowances, etc., passed upon. In the normal course of events, upon his discharge as bankruptcy receiver, Lipton will turn over to himself as perma-

nent receiver of Klein's Outlet, Inc., all of its assets and substitute himself as such in proceedings brought for the collection of the judgment.

"William R. Klein, one of the judgment debtors, asserts that he had purchased the claims of the unsecured creditors of Klein's Outlet, Inc., and that the corporation by David Klein, as an officer, has satisfied the judgment in favor of the corporation. David Klein, who has signed the purported satisfaction is one of the judgment debtors. No satisfaction piece signed by the receiver is produced and on the record the receiver of Klein's Outlet, Inc., is the only one who may legally satisfy the judgment in its favor.

"The persons to whom the awards were made by the final judgment of necessity must look to the receiver for the collection of the judgment and the payment of the awards.

"This application is a palpable attempt on the part of the judgment debtors by legal legerdemain to avoid the consequences of the judgment rendered in the corporation's favor against them in the stockholder's action. That there has been collusion between all of the parties permits of no doubt.

"Accordingly, the application is denied in all respects. Submit order."

Although the Referee's order dismissing the involuntary petition on the merits was made in March of 1948, the Referee's report as to allowances and disposition of the fund was not made until July, 1949. The reason for this long interval was that in the meantime Mr. William R. Klein had embarked on a series of motions personally attacking the Bankruptcy Referee, and the Referee was hesitant in making his report during the pendency thereof. His report recommended a statutory allowance to the Receiver, and an allowance to his attorney and to an accountant, and that the balance of the funds be turned over by Mr. Lipton, in his capacity as Bankruptcy Receiver, to himself in his capacity as Permanent Receiver under the State Court judgment.

Judge Holtzoff's order of September 22, 1949, modified and fixed the allowances and directed the disposition of the balance as recommended.

Judge Leibell in his opinion (appended herewith) refers to the unnecessary long history of this litigation and the endless maneuvers of William R. Klein. That gentleman is a former member of the Bar of the State of New York, and is determined to keep up this litigation as long as possible. It gives him the excuse to practice law. He claims such right not only on his own behalf but on behalf of the corporation. He uses this litigation as compensation for his frustration. Even now he has further actions pending (recently instituted) against Mr. Lipton for damages upon some fantastic theories. There just is no end!

POINT I.

THE DISTRICT COURT HAD THE POWER TO MAKE THE ORDER OF SEPTEMBER 22, 1949.

In March, 1948, the Bankruptcy Referee made a final order dismissing the involuntary petition on the merits after trial. No review or appeal was taken therefrom. The order, in accordance with the usual practice, reserved jurisdiction to pass on the account of the Bankruptcy Receiver, fix allowances and fees, and direct disposition of the funds in the hands of the Bankruptcy Receiver.

In July, 1949, the Referee made his report to the District Court, advising that the Receiver's account had been approved, recommending allowances to the Receiver, his attorney and an accountant, and stating that the balance of the funds should be paid over to the Permanent Receiver of the former alleged bankrupt. In accordance with the usual practice, the Clerk of the Court placed the matter on the motion calendar, all parties in interest being notified of the date. No notice of motion by either side was served or required and all that was properly before the Court, on such motion calendar, was the question of the approval, modification or disapproval of the recommended allowances and disposition of the funds.

Such matter came on before Judge Holtzoff who heard argument and then re-argument and then made his order of

September 22, 1949. Such order did no more than fix the allowances (amount modified in one respect), and direct the Receiver in Bankruptcy to pay the same and to turn over the balance of the funds to the Permanent Receiver of Klein's Outlet Inc. Judge Holtzoff struck out from the order a proposed provision for the discharge of the Bankruptcy Receiver and the cancellation of his bond, obviously because he considered said provision premature before actual distribution.

The opposition to such order was on the ground that the Court was without power to compensate the Receiver or his attorney, and was based on certain cases with which we have no quarrel. Such cases hold that compensation should not ordinarily be granted at the expense of the former alleged bankrupt to a Receiver or his attorney where the following circumstances appear:

(a) The alleged bankrupt contested the involuntary petition and the same was not filed at its instance, or filed in an effort to protect its directors from judgments against them in favor of the corporation.

(b) The Receiver was appointed at the instance of the petitioning creditors and over the objection, or at least without the consent, of the alleged bankrupt.

(c) There was a genuine, instead of a feigned, controversy between the petitioning creditors and the alleged bankrupt.

In our case the bankruptcy receiver was not appointed at the instance of the petitioning creditors, but the appointment was the direct result of actions taken by the alleged bankrupt, acting through its Board of Directors. The movant for such appointment was the Permanent Receiver of Klein's Outlook Inc., who deemed such move necessary for the benefit and protection of the bankrupt and its creditors. In addition to the unsecured creditors, whose claims William R. Klein claims to have purchased, there were substantial sums due to the United States of America, the State of New York, and the City of New York, as well as certain preferred claims for wages, and also the allowances made by the Supreme Court judgment. Under the applicable statute the Perma-

nent Receiver was vested with title to the corporate assets and obligated to collect the judgment in favor of the corporation against its directors and others. In this situation, the corporation, acting through its Board of Directors (the judgment-debtors) moved before the Bankruptcy Referee to stay the Permanent Receiver from attempting collection of the judgment against them, claiming that since the involuntary petition was still pending, such efforts on the part of the Permanent Receiver would constitute an interference with the administration in bankruptcy. Had it not been for such motion, the Permanent Receiver, in his capacity as such, would have proceeded with the collection of the judgment. Obviously, the judgment-debtors hoped, by such motion, to forestall any collection of the judgment. It was an obvious dodge. The Bankruptcy Referee granted their motion to the extent of restraining the Permanent Receiver, but ruled that under the circumstances a Receiver in Bankruptcy should be appointed. In this situation, the Permanent Receiver, in his capacity as such, and on behalf of the alleged bankrupt, applied for the appointment of a bankruptcy receiver, showing that otherwise the judgment would not be collected. The Court granted the application and appointed the same individual as Bankruptcy Receiver and the order empowered and directed the Bankruptcy Receiver to take any and all steps necessary or desirable to effect collection of the judgment. The Bankruptcy Receiver, with the aid of his attorney,

(a) Collected a substantial part of the judgment by proceedings supplementary to judgment and by actions against third parties indebted to the judgment-debtor, William R. Klein, who fought such actions at every turn, by numerous motions, ex parte stays and other maneuvers.

(b) He laid the seeds by third-party orders in proceedings supplementary to judgment, for further collections.

(c) He saved considerable money for the estate by compromising the substantial tax claims.

(d) He rendered other services for the benefit and enrichment of the estate, as detailed in the papers before Judge Holtzoff.

Judge Holtzoff held that the District Court which appointed the Receiver at its own suggestion and on motion of the only true representative of the alleged bankrupt, and ordered him to take steps as aforesaid, was not without power to compensate the Receiver and his attorney particularly since the estate was enriched in bankruptcy through their efforts.

POINT II.

THE APPEAL (IF ANY WAS TAKEN) FROM THE ORDER OF SEPTEMBER 22, 1949, WAS NOT TIMELY.

In the normal course of events the time to appeal expired forty days after September 22, 1949. Concededly, no notice of appeal of any kind was served during said period. Under date of October 6, 1949, the present petitioners obtained ex parte from Hon. William Bondy, an order to show cause "why the aforesaid order should not be resettled upon the grounds and in the respects set forth in the annexed affidavit, and such other relief given as is proper," and staying the distribution directed by the order of September 22, 1949, pending the determination of such motion for resettlement. Said order to show cause was based upon a wordy affidavit by William R. Klein, quarreling with the correctness of Judge Holtzoff's determination, but setting forth no claim that the order as signed failed to comply with the determination made, nor was a proposed resettled form of order submitted.

Under date of November 16, 1949, Judge Holtzoff signed an order which merely denied the motion to resettle and vacated the ex parte stay contained in the order to show cause.

Under date of December 22, 1949, Klein's Outlet Inc. and William R. Klein filed a notice of appeal which reads as follows:

"SOUTHERN DISTRICT OF NEW YORK.

In re KLEIN'S OUTLET INC., Formerly alleged Bankrupt.	In Bankruptcy No. 79509

PLEASE TAKE NOTICE that the undersigned hereby appeals from an order heretofore made by Hon. Alexander Holtzoff, District Judge, entered on or about the 16th day of November, 1949, amongst other things affecting resettlement, ordering certain allowances in favor of receiver and counsel and accountant for receiver etc. to the United States Court of Appeals, for the 2nd Circuit, and from each and every part thereof, and from the orders and therein recited upon which said order concerning resettlement thereof, was based, and from each and every part thereof.

Dated: New York
December 22, 1949

Yours etc.,

KLEIN'S OUTLET INC.,
William R. Klein,
Appellants.

To:
CLERK, U. S. DISTRICT COURT.
HAROLD L. LIPTON, ESQ.,
Receiver in Bankruptcy.
ARTHUR MORRIS, ESQ.,
Attorney for Receiver Lipton.
PAUL HYMAN,
Accountant.

To:
ARTHUR MORRIS, ESQ.,
as Attorney for the said Lipton,
Morris and Hyman."

The record was never printed.

Under date of March 27, 1950, the petitioners here, as appellants below, made a motion to extend their time to file and docket the record on appeal from order dated November 16, 1949. The following is the order to show cause bringing on the motion, and this Court is asked to notice that said order to show cause does not mention the order of September 22, 1949.

"UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

IN THE MATTER —of— KLEIN'S OUTLET INC., Formerly alleged Bankrupt.	In Bankruptcy No. 79509

UPON the annexed affidavit of William R. Klein, sworn to the 27th day of March, 1950, and the proceedings heretofore had herein, LET Harold L. Lipton or his attorney show cause, at a Motion Term to be held by this Court at the U. S. Courthouse, Foley Square, in the City of New York, on the 10 day of April, 1950, at 10:30 A.M. thereof or as soon as counsel can be heard why an order should not be made extending the time of the movants as appellants herein to file and docket their record on appeal, heretofore taken from an order of the United States District Court for the Southern District of New York, made by Hon. Alexander Holtzoff bearing date the 16th of November, 1949 for a period of days in view of the circumstances herein, and for such other and further relief as is fitting in the premises; and it is further

ORDERED that service of the within order upon the office of the attorney and the papers annexed shall be good and sufficient if made, by serving a true copy

thereon upon the office of the attorney for Harold L. Lipton on or before the 29 day of March, 1950.

Dated New York
March 27, 1950

THOMAS A. SWAN,
USCJ"

We countered with a cross-motion to dismiss on the grounds (1) that insofar as the notice of appeal dated December 22, 1949, may be construed to be an attempt (by indirection) to bring up the order of September 22, 1949, it was insufficient and, in any event, untimely, and (2) that as to both orders, the appellants had failed, as required by the rules to show a meritorious appeal.

At the outset we submit that there was no appeal from the order of September 22, 1949. The notice of appeal printed in full above specifies by date only the order of November 16, 1949. The motion for extension of time (order to show cause printed above) specifies only the order of November 16, 1949.

However, even if we assume that the notice of appeal is sufficient as an appeal from the order of September 22, 1949, then we respectfully show that it was not timely, and we refer to the opinion of the Court of Appeals thereon.

POINT III.

THE APPEAL FROM THE ORDER OF NOVEMBER 16, 1949, ALTHOUGH TAKEN IN TIME, WAS PROPERLY DISMISSED SINCE THE APPELLANTS WERE IN DEFAULT IN FILING THE RECORD AND FAILED TO SHOW A MERITORIOUS APPEAL. THE APPEAL FROM SAID ORDER WAS FRIVOLOUS.

The office of a motion to resettle is to have the order as signed corrected so as to conform to the decision. It is not the function of such motion to quarrel with the correctness of the decision. The Court of Appeals said:

> "It is obvious that such denial was correct, since in no respect did that order fail to conform to the court's decision."

After the Court of Appeals dismissed, the petitioners here moved in that court for a rehearing and asserted that even though their notice of motion resulting in the order of November 16, 1949 was, in form, one for resettlement, that the movants sought other relief not disposed of, one way or the other, by the order of September 22, 1949, and that Judge Holtzoff made a determination thereof for the first time by his order of November 16, 1949. We submitted, at the direction of the Court of Appeals, an answering memorandum, which we understand is now before this Court, and we respectfully refer thereto. We show therein that even though we assume the correctness of the claim (although there is nothing in the second order to so indicate), that that simply meant that on review of the second order the Court of Appeals could consider the correctness of such determination made by the second order of new matter, admittedly not embraced in the earlier order.

The alleged additional grievance, which appellants below claim was dealt with for the first time on the last motion, was to remove the Referee. We showed to the Court of Appeals that even though the notice of appeal from the November 16, 1949 order was timely, and on such appeal the Court would reach the question of the correctness of Judge Holtzoff's refusal to supplant the Referee, that the appeal was frivolous for the simple reason that another Judge of the court, Hon. Samuel H. Kaufman, had already, by order, denied said motion, and that Judge Holtzoff was being asked to sit as an Appellate Court over Judge Kaufman.

POINT IV.

WHETHER OR NOT THE GROUNDS SET FORTH FOR THE DISMISSAL WERE CORRECT, IT WAS WITHIN THE DISCRETION OF THE COURT OF APPEALS TO DISMISS, SINCE THAT COURT WAS NOT, IN ANY

EVENT, BOUND TO GRANT APPELLANTS' MOTION TO EXCUSE THEIR DEFAULT IN PRINTING AND FILING THE RECORD OR TO GRANT THEM FURTHER TIME.

POINT V.

THE QUESTION SOUGHT TO BE PRESENTED TO THIS COURT IS NOT ONE EMBRACED IN RULE 38(5) OF THE RULES OF THIS COURT, NOR DO PETITIONERS COMPLY WITH THE REQUIREMENTS OF RULE 38, SUBDIVISIONS 1, 2 AND 3.

The only papers we received are (a) a carbon copy of a typewritten notice (undated) notifying us that the "within petition for a writ of certiorari" was filed in this Court on July 10, 1950, and (b) a typewritten copy of additional papers purporting to be the writ, etc. APPLICATION FOR THE

We were not served with a copy of the record.

In any event there are no special or important reasons for this writ, as same are enumerated in Rule 38(5).

It is claimed that Klein's Outlet Inc. is not in possession of its funds and that printing should be dispensed with. William R. Klein is also a petitioner and no claim is asserted that he is without funds.

POINT VI.

CERTIORARI SHOULD BE DENIED WITH COSTS.

Respectfully submitted,

HAROLD L. LIPTON,
Respondent
(A Member of the Bar of this Court).

ARTHUR MORRIS,
Of Counsel
(Attorney for Respondent as Appellee below).

APPENDIX.

Opinion By Mr. Justice Levy.
(Law Journal, February 24, 1944.)

Klein v. Klein's Outlet Inc.—More than adequate time was given upon application to the opposition to obtain the affidavit of one of the defendants now in military service stationed not far from New York City. It is a fair conclusion that the time thus given was not devoted to the end for which it was sought and secured but was rather intended to and did serve to delay. The affidavit finally submitted was made not by the party but by counsel, who must have known that the matters pertinent upon this application were all of record and known to him personally, and that there was no proper or useful purpose to seek additional time. This is not the first instance in which the defendants have earned judicial criticism and their good faith has been impugned. In scores of maneuvers in this court, the Federal District Court and the Circuit Court of Appeals, the defendants have been successful thus far only in delaying justice. Their failures condemn their acts as well as many of the expressions contained in the opinions filed in some of the proceedings in the Federal District Court and the Circuit Court of Appeals (In re Klein's Outlet, Inc., 48 Fed. Supp., 416, Bright, D. J., January 27, 1944; Klein v. Rosenberg, trus., C. C. A., 136 Fed. (2d), 986, Clark, C. J., June 9, 1943; In re Klein's Outlet, Inc., 50 Fed. Supp., 557, Bondy, D. J., February 26, 1942). Involved too, is the unusual action of a referee in bankruptcy disqualifying himself after an application was made for substitution. It may well be repeated that these maneuvers have had at least the ostensible purpose of avoiding and evading the effect of the as yet uncompleted reference and accounting ordered by interlocutory decree in this court as long ago as December, 1940.

To the specific relief now sought by the moving plaintiff there is no conceivable legitimate answer. The notice of motion asks for costs in the event the application is opposed.

Yet the corporate defendant not only opposed but sought and secured additional time for an opposition, which it should have known was ineffectual. The judges in the federal jurisdiction have clearly indicated the issues in this court were to remain here and to proceed speedily to final determination. The many attempts to thwart that purpose have been severely criticized.

The motion is in all respects granted, with $10 costs. The cause will proceed with Rose Klein as the sole plaintiff and without further obstruction, and the title of the action will be deemed amended accordingly.

Note: The Referee referred to by Mr. Justice Levy is not Mr. Referee Joyce, but a former Referee of the court referred to by the Court of Appeals in 136 Fed. 2d 396, and who shortly thereafter resigned from this case.

Opinion By Judge Leibell, D.J.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER —of— KLEIN'S OUTLET, INC., Debtor.	In Bankruptcy No. 79509

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New York, N. Y.

LEIBELL, D. J.

This matter is again before this Court. The debtor and certain creditors have filed petitions to review an order of Hon. John E. Joyce, Referee in Bankruptcy, dated January 21, 1947. The Referee's order was entered upon his decision filed December 31, 1946, wherein it was found that the arrangement proposed in a petition of the debtor filed under Chapter XI of the Bankruptcy Act August 2, 1946, is not made in good faith. The order denied the debtor's application for confirmation of the arrangement and refused confirmation; it dismissed the proceeding filed August 2, 1946 for an arrangement under Chapter XI; it ordered that the bankruptcy be proceeded with pursuant to the provisions of the Act. It also ordered that the debtor be enjoined from filing any petition for an arrangement which proposes or contemplates that the judgment entered in the New York Supreme Court on June 7, 1945 in favor of the debtor against William R. Klein and others in the sum of $29,915.03 shall be satisfied or discharged except upon payment to the debtor of its value.

The proposed arrangement dismissed by the aforementioned order of January 21, 1947 is described in the Referee's opinion of December 31, 1946 as follows:

> "The pending arrangement, which has been accepted by all creditors affected thereby, accompanied a petition filed under Section 321 of the Bankruptcy Act (11 U. S. C. 721) on August 2, 1946. The arrangement proposes (1) a division of unsecured creditors into two classes, one designated as Class A, comprising merchandise and loan creditors, to whom a payment of 35% in cash is offered, and the other as Class B, comprising all other unsecured creditors, to whom the debtor will deliver a satisfaction and discharge of

the judgment hereafter mentioned, and (2) a capital contribution to the debtor of $3,000. in consideration of the treatment proposed for Class B creditors.

"The petition is the third of its kind filed in the bankruptcy proceeding which was commenced by the filing of an involuntary petition on September 26, 1941 and followed by the filing of a petition by the debtor under Section 321 on October 3, 1941 after the intervening stockholder filed an answer to the involuntary petition. See Klein v. Nu Way Shoe Company, 136 F. (2d) 986."

The Referee's opinion then proceeds to review the various arrangements offered and their disposition, and sets forth the reasons for the dismissal of the present arrangement in the following paragraphs:

"Considered de novo the record of the proceedings establishes that the arrangement is not in good faith. Acceptance by all creditors is not sufficient. The statute (11 U. S. C. 761) requires, nevertheless, a finding that the court is satisfied that the arrangement and its acceptance are in good faith. Its object is to defraud the debtor of a sizable asset and the minority stockholder of any value for her stock by extinguishing an established liability of the majority stockholder who directs and controls the debtor's course. Confirmation is refused and it is directed that bankruptcy be proceeded with pursuant to Section 376 of the Bankruptcy Act (11 U. S. C. 776)."

* * * * *

"The vice of this cycle has been demonstrated by the successful opposition by the petitioning creditors to the intervener's motion to strike the involuntary petition in bankruptcy under F. R. C. P. 12e for failure to comply with an order directing a bill of particulars. On September 26, 1946 an opinion was filed holding that an involuntary bankruptcy petition could not be dismissed or stricken while an arrangement proceeding begun under Section 321 was pending.

"If the debtor can thwart the exercise of that power by the simple course of filing successive petitions for an arrangement similar to others, confirmation of which has been refused, it is arrogating to itself a

right to prevent the termination of a proceeding except upon the terms and conditions it proposes. That right does not exist. The cross motion is granted to the end that the debtor shall be enjoined and restrained from filing a petition for an arrangement which proposes or contemplates that the judgment shall be satisfied and discharged except upon payment to the debtor of its value. Settle order accordingly on three days notice."

The Circuit Court of Appeals of this Circuit on March 12, 1947 rendered an opinion in still another phase of this proceeding. William R. Klein had filed a petition in the District Court against the Receiver and another to enjoin the collection of the above mentioned judgment on behalf of the corporation Klein's Outlet, Inc. The Referee in Bankruptcy dismissed the petition and refused leave to amend. The Referee's order was affirmed on appeal.

The following quotations from the appellate court's opinion show what that court thinks of the delaying tactics pursued by William Klein in his efforts to avoid paying the judgment:

> "Some of the long and somewhat bizarre history of plaintiff's attempts to avoid satisfying a valid judgment can be found in Klein v. Nu Way Shoe Co., 2 Cir., 136 F. 2d 96. More details can be found in Judge Bright's opinion in an unreported case, In the Matter of Klein's Outlet, Inc., D. C. S. D. N. Y., Jan. 27, 1944, declining to approve plaintiff's offer of a one-sided compromise. The judgment which plaintiff seeks to avoid paying was obtained against him and others in a state court in a stockholders' action on behalf of the defendant corporation. Later an involuntary petition in bankruptcy inspired by plaintiff was filed against the corporation. In our earlier decision we ordered a trial on the issues of insolvency and act of bankruptcy; but trial has not yet been had, apparently because of the delaying tactics pursued below. * * * The judgment itself became an asset of the corporation, Clarke v. Greenberg, N. Y., Jan. 16, 1947; as Judge Bright showed in his opinion supra, and as now

appears, such offers of settlement as the plaintiff has made have had too many strings attached to them and have involved so little clear cash as not to deserve serious consideration. The contention that the judgment was fraudulent, which apparently was not pressed at the argument, appears to rest upon the objection that plaintiff's testimony was rejected, and his opponent's testimony accepted, in the state court trial. The contentions that collection of the judgment would somehow interfere with the administration (hardly begun) of this bankrupt estate—perhaps either already solvent or made so by this judgment—seem hardest to decipher. Such preliminary steps as have been taken clearly can be easily adjusted to receive the benefit of this additional asset, the payment of which, as this futile appeal additionally demonstrates, has already been too long delayed."

To return to the proceeding before the Referee, I am in full accord with the Referee's conclusions and the reasons therefor. A bankruptcy court is a court of equity. It looks beyond the form to the substance. This Chapter XI offer is merely the form through which a substantial fraud would be perpetrated on the corporation and its minority stockholder in the interest of William Klein, the majority stockholder. The Referee has dismissed the offer as made in bad faith. It was all of that.

The petitions to review the Referee's order of January 21, 1947 are dismissed and the order is affirmed. The request of debtor's counsel and William Klein that the Referee's certificate and all the papers thereto attached or referred to be sent back to said Referee for the addition of material matter consisting of documents and opinions of the Referee which debtor's counsel thinks should constitute a part of the record is denied as interposed to further delay these proceedings. The attorney also states that he has "just discovered some decisions which justify reargument by the Referee" and that "There is a motion pending before the Referee for such reargument" and that "There is also a motion for reconsideration on additional facts pending before the Referee." All this is but further evidence of the purpose of William Klein

to drag out these proceedings interminably so as to delay the collection of the judgment entered against him which is the property of the debtor.

"Equity may enjoin vexatious suits, not brought in good faith and instituted for annoyance or oppression or to cause unnecessary litigation." 43 C. J. S. p. 479, Section 39. In the present proceeding a "clear and substantial case" has been made out. It is an inherent power of the Court to protect its own process, procedure and decrees from an abuse that amounts to an obstruction of the proper administration of justice. It may do so to avoid the relitigation of questions once settled between the same parties. Root v. Woolworth, 150 U. S. 401.

The record of the tactics pursued by William Klein, the controlling stockholder of Klein's Outlet, Inc., as set forth in the Referee's opinion reveals a most exceptional situation. There has been a deliberate and studied attempt extending over a period of over five years, to prevent the corporation from realizing on a claim against William Klein and others, which is now a judgment in the sum of $29,915.03. If collected, it would not only pay the corporation's creditors the full amount of their legitimate claims but would also make a considerable sum available for the minority stockholder, Rose Klein. Every conceivable motion and application has been resorted to in order to tie the hands of the receiver appointed by the Court and to obstruct the orderly legal procedure in this matter.

Upon the argument of the present petition for review of the Referee's order of January 21, 1947, the attorney for the receiver stated that he had been in this Court at least thirty times in this matter as a result of the delaying tactics of William Klein and his attorney and the attorney for the corporation. The situation they have thus deliberately created has become a challenge to the Court and to the procedure established for the administration of justice under the Bankruptcy Act.

In its scrupulous care to afford a litigant a complete and fair hearing, must this Court permit the repetition of trans-

parent attempts to deliberately frustrate the exercise of its power to determine the issues presented by the involuntary petition in bankruptcy filed herein September 26, 1941?

I recognize that an injunction to restrain vexatious suits is a remedy to be granted only in extreme case. But we have here all the elements requisite for the application of that remedy. Something must be done to end this scandalous situation. The injunction will stand. If any person wilfully disobeys the order of the Referee, he should be proceeded against for a contempt of court. (See 9 C. M. S. p. 1002, Sec. 279(c).)

The order of the Referee, dated January 21, 1947, is affirmed. Settle order on two days' notice in accordance with this opinion.

Dated, March 25th, 1947.

/s/ VINCENT L. LEIBELL,
United States District Judge.